EDITOR'S NOTE

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ORIGINAL

SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner,

No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondents, James Anthony Sweeton, et al., by counsel, ask leave to file the attached brief in opposition to petition for writ of certiorari, without payment of costs and to proceed in forma pauperis. A class member's affidavit in support of this motion is attached.

Dated: JAN. 22, 1992

Respectfully submitted,

MICHIGAN CLINICAL LAW PROGRAM

Paul D. Reingold (P27994)
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SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner, No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Rose Marie Green, being first sworn, state that I am a member of the respondent class in the above-captioned case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of the case.

I further swear that I am not presently employed; that within the past twelve months I have not received any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source; that I do not own any cash or checking or savings accounts; that I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

The other class members and I are all inmates in the Michigan correctional system.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rose Marie Green

Subscribed and sworn to before me on this 22nd day of January, 1992.

My commission expires: 11-15-93

SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner, No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

PROOF OF MAILING

On February 14, 1992, I mailed two copies of:

Respondents' Brief in Opposition to Petition for Certiorari; and this proof of mail service

to: David Edick
Assistant Attorney General
Corrections Division
PO BOX 30216
Lansing, MI 48909

by: first class mail

I declare that the statements above are true to the best of my information, knowledge and belief.

Date: 02-14-92

Betty Scheffler

Betty Scheffler
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February 14, 1992

FEDERAL EXPRESS

Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

McGinnis, et al. vs. James Anthony Sweeton, et al.
Case No. 91-976

Dear Clerk of the Court:

Enclosed for filing please find the original and twelve copies of the Respondents' brief in opposition to petition for certiorari and proof of mail service.

Also enclosed is a Motion to proceed in forma pauperis with a class member's affidavit in support attached.

Very truly yours,

MICHIGAN CLINICAL LAW PROGRAM

Paul D. Reingold
Counsel of Record

/b
encls.
xc: David Edick

No. 91-976

In the
Supreme Court of the United States
January Term, 1992

[redacted] L. McGINNIS, et al.,

Petitioners,

vs.

[redacted] ANTHONY [redacted], et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED

Where

(1) in 1981 the district found that state rules and regulations created liberty interests protected by due process;

(2) the defendants then entered into a consent judgment that required more of them than was required under state law;

(3) in 1984 the district court denied the same jurisdictional challenge that is being made now, and the court's order was not appealed; and

(4) enforcement of the consent judgment has continued up to the present day:

I.

Can the defendants (petitioners) collaterally attack the district court's jursidiction (to enter the original consent judgment) under Rule 60(b)?

II.

Can the defendants (petitioners) assert immunity under the Eleventh Amendment?

LIST OF PARTIES

The parties are accurately described in the petitioners' list of parties. All parties in the district court and court of appeals are parties in this action (although named officials have been automatically substituted as defendants and members of the plaintiff class have come and gone).

TABLE OF AUTHORITIES

Other **Pages**

OPINIONS BELOW

Please refer to the petitioners' brief. An underlying opinion of the U.S. District Court for the Eastern District of Michigan, which was entered on March 31, 1981, appears at the end of this brief as Appendix 1a-13a. An excerpt of a bench opinion issued on May 31, 1984, is attached as Appendix 14a-21a.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on September 17, 1991. The Clerk of this Court extended the time to respond to the petition to February 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PLAINTIFFS' (RESPONDENTS') STATEMENT OF THE CASE

a. 1977 - 1981

This action was filed in September, 1977, as a class action on behalf of inmates within the jurisdiction of the Michigan Department of Corrections ("MDOC") who are eligible for parole. The action challenged the procedures of the MDOC and its Parole Board, alleging that the parole hearings provided were inadequate, that hearings and decisions were untimely, that the parole decision-making process was not uniform, and that inmates were being denied access to their files, among other claims. Six of the seven counts pled in the first amended complaint alleged violations of the Fourteenth Amendment to the U.S. Constitution.[1]

In August, 1978, the district court dismissed the claim that the plaintiffs had a right to a full-blown due process parole hearing. The district court denied that claim because "...in this circuit at least, the requirements of due process are not applicable to parole release hearings." See Opinion dated 8-17-78, Petitioner's Appendix at 118a, emphasis added. The court held that release on parole was not a right, and therefore the plaintiffs' claim that they were entitled to a particular kind of hearing--including adequate notice, an opportunity to be heard, representation by counsel, a written decision, a transcript, etc.--could not be sustained. (Although the plaintiffs disagreed with the court's ruling on this issue, they gave up their right to appeal the merits when a consent judgment was later entered.)

---

[1] Only one count of the complaint (Count VII) alleged a pure pendent state law claim, for violations of the Michigan Administrative Procedures Act. It was dismissed by stipulation.

Contrary to what the defendants assert in their petition for certiorari, at pp. 3-4, the district court did not dismiss all of the plaintiffs' federal constitutional claims. In the very next breath the district court said:

> The [preceding] section of this opinion dealt with what due process rights plaintiff inmates have directly under the United States Constitution. When, however, the state itself provides by statute or regulations that certain procedures must be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created and the due process clause requires certain minimum procedures "to assure that the state-created right is not arbitrarily abrogated." [Citations omitted.]

Id. at 118a-119a, et seq. The district court made it clear that although the plaintiffs' surviving claims might stem from state law or regulation, they were for federal constitutional violations, and the action would therefore proceed under the federal civil rights law, 42 U.S.C § 1983. Id. at 118a-126a.

In October, 1979, the defendants moved to dismiss on the grounds that only state law claims remained in the case, and that therefore the court should abstain. The motion was denied by an order dated March 10, 1980, and the defendants did not appeal.

Instead of litigating the case further, the defendants began to negotiate. Between March 10 and June 11, 1980, the defendants signed no fewer than five separate partial consent judgments, in addition to a stipulation and order for entry of a consent judgment, and a stipulation and order to give notice to the class. At about the same time the parties filed cross-motions on the issues that had not been settled (relating to inmates' access to their files, and to the distribution of certain parole information). In December, 1980, with the defendants' approval,

the district court entered a final partial consent judgment as to all of the uncontested issues.

If there were any doubt about the vitality of the federal claims in the case, it was dispelled on March 31, 1981, when (after re-assignment) the district court issued a memorandum opinion and order denying the defendants' motion to dismiss, and granting the plaintiffs' motion for summary judgment on the remaining contested issues in the case.

Summarizing the litigation to date, the court said:

> The complaint alleges a pattern of activity in violation of pertinent state regulations, state law and the United States Constitution. The plaintiffs assert that their Fourteenth Amendment due process rights are abridged by the state's method of administration of the parole system as a whole.
>
> On December 16, 1980, after an extended period of discovery, the disposition of several motions, and diligent efforts to settle the litigation, the parties entered into a partial consent judgment resolving many of the claims of constitutional violations originally asserted.

Opinion at p. 1, Respondents' Appendix at 1a (emphasis added).

Contrary to the defendants' characterization of the case as involving "only state law claims," the court went on to say:

> ...the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart independent liberty interests to those inmates participating in the system. ...The shortcomings of present policies constitute not only a violation of [Michigan law], but primarily, as far as this court is concerned, a violation of federal constitutional due process rights which were born from state promises and are now totally independent of the definitions or perimeters [sic] of the Michigan Act. This violation is a federal issue, to be addressed by this court.

Id., Respondents' Appendix at 3a-4a.

In deciding the motion, the court plainly applied federal constitutional law. For example, regarding access to inmate files, the court acknowledged the disagreement among the circuits about whether or not there was a direct constitutional right that inmates be given some access to their files, but it clearly found such a derivative right created by state law in this case:

> ...this court holds (as did Judge Feikens) that the state's promulgation of policies and regulations which purport to provide for some right of access, creates a liberty interest in inmates that cannot be arbitrarily or capriciously abridged.
>
> The rules promulgated by the Department governing access to files have been furnished to this court. They are listed by reference number, among the stipulated facts, and consist of thirteen operating procedures, two policy directives and eight Director's Office Memos.

Id. at 8a. Having identified substantive rights created by these state rules and regulations, the district court found that:

> ...the Department implements these rules in a manner that places insurmountable obstacles in the path of an inquiring inmate.

Id. Accordingly, the court granted the plaintiffs' motion for summary judgment, and awarded attorneys' fees under 42 U.S.C. § 1988 (again indicating that federal claims had been decided).

The defendants initially appealed, but on August 28, 1981, the court signed and entered a final consent judgment, incorporating into one document the terms of all of the partial consent orders that had been entered before, and settling the issues that had been contested in the cross-motions the previous spring. The defendants voluntarily dismissed their appeal in December, 1981. By entering into the consent judgment, the plaintiffs also gave up their right to appeal on the parole hearing issue.

It is noteworthy that the consent judgment does not simply order the defendants to obey the state parole statute. It sets up a series of mechanisms (that the defendants negotiated and approved) going well beyond the requirements of state law--to make sure that the parole system operates in a uniform, fair, and timely way, and to guarantee that the rights created by state law and regulation are not unconstitutionally abridged. See Petitioners' Appendix at 62a.[2]

Nor does the final consent judgment require the MDOC to grant parole to any class member, or dictate the kind of hearing that the defendants must provide. Rather the consent judgment concerns the uniformity of the parole process and of parole decision-making, the timeliness of that decision-making, the timeliness of release in cases where parole is granted, access to files, monitoring of the judgment, etc. Although the defendants characterize the consent judgment as a "highly intrusive" scheme imposed upon them by the court, Petition at 16, in fact the defendants agreed to every provision, after having drafted or co-written or re-written nearly every paragraph of the judgment.

b. 1981 - 1985

Monitoring of the final consent decree began in August, 1981, and continued for 30 months. In February, 1984, when the parties were fighting about whether or not monitoring should be

---

[2] For example, the consent judgment requires that all initial parole hearings must be held at least 90 days before the earliest release date (with some exceptions). See ¶ III(B). Although this provision exceeds the requirements of the state parole statute, it was designed to give the defendants enough lead time to make the decision about parole, and to implement a favorable decision, before an inmate's earliest release date.

extended, the defendants moved to vacate the consent judgment. Citing this Court's decision in Pennhurst II, which had just been decided, the defendants again argued that the consent judgment was based exclusively on state law and that therefore the federal court lacked jurisdiction to enter it in the first place. The defendants also argued that changes in state law justified vacating the consent decree. That motion was denied in November, 1984, and monitoring was extended by the court. The court said that the defendants had "waived their immunity completely by their participation in every step of this litigation," and it reiterated that Michigan rules and regulations created liberty interests that were enforceable under the U.S. Constitution in federal court. Respondents' Appendix at 18a-19a. The defendants accepted the ruling of the district court and did not appeal.

In June, 1985, when a final monitoring report showed that the defendants' performance was improving and that parole guidelines had finally been drafted, the district court allowed the monitoring to end.

c. 1987 - 1991

On August 5, 1987, the trial court re-opened the case and appointed substitute counsel to represent the class in light of indications that the defendants had not complied with the 1981 consent judgment. The case was re-opened after the district court got a flood of complaints from inmates whose decisions or releases were way beyond the time limits imposed by the judgment, and when it was revealed that the parole guidelines drafted in 1985 still had not been implemented. The defendants took no appeal from the re-opening of the case.

The plaintiffs then engaged in discovery and began monitoring the defendants' compliance with the consent judgment. The plaintiffs spent 10 months evaluating the defendants' compliance. This was met with consistent recalcitrance by the defendants, for which the district court imposed Rule 11 sanctions against them.

In June, 1988, after further briefing and hearings, the trial court found that the defendants were out of compliance with the timeliness requirements of the consent judgment, and that parole guidelines still had not been implemented. It renewed the formal monitoring process for another year. Once again, the defendants did not exercise their right to appeal.

In January, 1990, after 18 months of extensive discovery and monitoring, the plaintiffs filed a comprehensive report documenting the defendants' non-compliance with the consent judgment. The plaintiffs also filed a motion to find the defendants in continued non-compliance--and seeking additional and ongoing relief--so that at last the consent judgment might be obeyed.

In March, 1990, the defendants filed a motion to dismiss and/or to modify the consent judgment. (This is the motion on appeal now.) Despite the earlier rulings against them, once again they argued that the district court never had jurisdiction to enter the consent judgment in 1981 because the judgment was based exclusively on state law. Alternatively, the defendants argued that the judgment should be modified to reflect supposed changes in state law. The 1990 motion raised exactly the same issues that had been raised in 1984, and that had been decided adversely to the defendants then, and that had not been appealed.

In May, 1990, the district court issued an order finding the

defendants in non-compliance, setting a new monitoring period, appointing a magistrate to monitor compliance, and requiring the defendants to implement parole guidelines within one year. (No guidelines had been implemented in the nine years since the entry of the consent judgment, despite its provisions requiring the defendants to do so.) The district court denied the defendants' motion to dismiss for lack of jurisdiction, and this time the defendants appealed.[3]

d. The Sixth Circuit Opinion

The Sixth Circuit agreed with the plaintiffs in all respects. It affirmed the district court's denial of the motion to dismiss on jurisdictional grounds, and it reversed the district court's modification of the 90-day standard.[4]

On the jurisdictional issue the panel strongly disagreed with the defendants' characterization of the case:

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[3] The lower court also allowed one modification of the consent judgment. The defendants had asked the court to change the 90-day hearing provision to a requirement that hearings be held "at least one month" prior to the release date. This request was based on purported state statutory changes occurring after the entry of the consent judgment. The lower court inexplicably granted the modification even though the language of the statute (requiring hearings "at least one month" before the release date) had been the same since the consent judgment was entered in 1981, and even though the same request for modification had been denied in 1984. Accordingly, the plaintiffs cross-appealed on the modification issue.

[4] On the modification issue, the Sixth Circuit used the same standard just approved by this Court in Rufo v. Inmates of Suffolk County Jail, ___ U.S. ___, 60 U.S.L.W. 4100 (decided January 15, 1992). The Sixth Circuit found that state law had not changed, that the language of the consent judgment did not conflict with state law, that there was no policy reason to modify the judgment, and that the purpose of the judgment would not be furthered in a more efficient way by the modification. Petitioners' App. at 45a-51a. This issue has not been appealed by the defendants, and it will not be addressed further.

> ...the [defendants] continue to insist that the liberty interest involved here is the right to parole. The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process. This is a fundamental element of this action, which should not be further mischaracterized.

Petitioners' Appendix at 18a-19a (emphasis added).

In affirming, the Sixth Circuit held that the district court was entirely within its rights to identify and to recognize state-created interests protected by the due process clause of the U.S. Constitution. The panel noted that this Court has "clearly ruled that protectible liberty interests may arise from state-created statutes, regulations, rules and policies." Id. at 19a-20a.

If the defendants had chosen to litigate the claims instead of settling them, it is possible that the district court or the Sixth Circuit might have found the plaintiffs' state-created rights to be more circumscribed. But the defendants chose to settle the case, and therefore, according to the Sixth Circuit, they cannot now object to "the enforcement of a remedy that they selected." Id. at 28a. The plaintiffs likewise bound themselves by consenting to the judgment, thus waiving their right to appeal the parole hearing issue that had been decided against them.

Accordingly, the Sixth Circuit held that (1) the district court clearly had jurisdiction; (2) the current jurisdictional challenge was decided in 1984, without an appeal, and could not be relitigated now; (3) the Eleventh Amendment was no bar because the judgment was based on federal claims; (4) the district court had authority to enforce compliance with the consent decree on an

ongoing basis; and (5) Rule 60(b) could not be used to re-litigate the merits, or to mount what was in essence a collateral attack on the district court's decision that it had jurisdiction.

In December, 1991, the defendants filed their petition for certiorari to challenge the decision of the Sixth Circuit. The plaintiffs now file this timely response.[5]

ARGUMENT

I. THE DEFENDANTS CANNOT RE-LITIGATE THE MERITS OF THE CASE UNDER THE GUISE OF A JURISDICTIONAL CHALLENGE

A. The claims resolved by the consent judgment were federal constitutional claims, and not pendant state law claims.

As noted above, the defendants have relentlessly tried to characterize this case as involving only pendant state-law claims. This characterization of the case is flatly wrong, and is completely unsupported by the record. As the plaintiffs' counter-statement of the case shows, the district court was as clear as it could be on this issue. The district court said repeatedly that the plaintiffs' surviving claims--which were ultimately settled in the consolidated consent judgment--were federal constitutional claims, based on rights granted to the plaintiffs by state laws, regulations, policies, and procedures. See Plaintiffs' Statement of the Case, supra.

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[5] In the meantime the case has gone forward in the district court. In August, 1991, after the end of a monitoring period, the plaintiffs' filed another motion to find the defendants in non-compliance. As of that date parole guidelines still had not been implemented, and the defendants had failed or refused to supply information from which compliance with the timeliness provisions of the consent judgment could be measured. On January 23, 1992, in an opinion from the bench, the district court granted the plaintiffs' motion, ordered supplemental relief, and extended monitoring for another year.

The defendants further mischaracterize the case in their petition for certiorari. Now they say that both the district court and the court of appeals described the inmates' state-created rights as procedural rights only (that could not give rise to any constitutional protections). Petition at 12. But neither the district court nor the court of appeals expressed that limited view of the plaintiffs' rights. See Pet. App. at 16a-25a, and Resp. App. at 3a.

Obviously most of the rights created by state law or regulation were not litigated, but were settled. Therefore it is impossible to know how the district court would have come out as to each right claimed, or what might have happened had the case been litigated to conclusion, or had the defendants filed an appeal on this issue. As to some claims, the courts might have found that the state rules and regulations were not couched in sufficiently mandatory language to confer a right, or that the substantive limitation on official discretion was too narrow to establish the right alleged. See e.g., Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989) (prison rules on visiting lacked sufficient mandatory language to support a state-created right of visitation absent certain conditions); and Olim v. Wakinekona, 461 U.S. 238 (1983) (a state creates a protected liberty interest by placing substantive limitations on official discretion).[6]

The one certain thing is that the rights being claimed--the

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[6] Had the plaintiffs not entered into the consent judgment, but appealed, they might have persuaded the Sixth Circuit that Michigan regulations create a constitutionally protected right to parole. See Board of Pardons v. Allen, 482 U.S. 369 (1987).

right to uniform standards of decision-making, the right to timely hearings, the right to timely release once a favorable decision was made, the right of access to files, etc.--were not procedural rights. The plaintiffs argued, and the district court twice agreed, that as to these issues the state rules and regulations limited the discretion of state officials without regard to the procedures they employed.

The defendants may have had broad discretion in deciding whether or not to grant parole, or in the kind of hearing that they would offer, but as to the standard that they were to apply, and as to the timing of the decision, and as to the implementation of a favorable decision (release), and as to inmates' access to their files, the plaintiffs claimed that the defendants' discretion was limited in a substantive, mandatory way, that gave the plaintiffs rights regardless of the procedures used. These are precisely the sort of rights that have long been enforceable in federal court. See e.g., Vitek v. Jones, 445 U.S. 480 (1980); Hewitt v. Helms, 459 U.S. 460 (1983); and the cases cited by the Sixth Circuit on this issue, Pet. App. at 20a-21a.

That those rights were infringed because the Parole Board followed, or failed to follow, certain procedures, does not make the rights themselves procedural. The defendants' fundamental mischaracterization of these issues was rejected by the courts below, and it should be rejected again here. As long as there was any colorable federal claim which formed the basis for the entry of the consent judgment, the defendants' claim that the judgment was "void" must fail.

This Court has held that in order to enter a consent decree,

a district court must find only that the decree (1) "springs from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) "come[s] within the general scope of the case made by the pleadings," and (3) "further[s] the objectives of the law upon which the complaint was based." Local Number 93, Internat'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). Surely that standard was met here.

B. Even if it were arguable that the district court erred in finding state-created interests subject to constitutional protection, that decision on the merits could not be overturned under Rule 60(b).

The essence of the defendants' argument is (1) that the rulings of the district court over the years on the merits of the constitutional questions raised were simply wrong, (2) that if the case should have been dismissed on the merits, then there was no subject matter jurisdiction, and the consent judgment is "void," and (3) if it is void, it is subject to collateral attack at any time under Rule 60(b)(4) and on appeal here, even though the defendants failed to appeal any of the previous rulings and entered into a consent judgment.

This attempt to relitigate issues under the guise of Rule 60(b) is a shamelessly improper use of the rule. All of the issues raised in the defendants' petition are issues "on the merits" which have already been decided numerous times below and which this Court should not address. As aptly noted by the Ninth Circuit in a far less egregious attempt to relitigate issues:

> We agree with the district court. The modification of the decree to extend to all the inmates sentenced to death wherever housed has been in effect for years.... The prison officials had their opportunity to appeal the modification of the decree when the court ordered them to negotiate and when the court accepted the

> Monitor's First Report and modified the decree to extend to the inmates wherever housed. This is the Monitor's Fourth Report. We will not allow prison officials four bites at the apple.

Thompson v. Enomoto, 915 F.2d 1383, 1390 (9th Cir. 1990), cert. denied, 60 U.S.L.W. 3520 (1992)(emphasis added).

If this Court were to permit the re-litigation of decided issues under the defendants' analysis, the principles of finality and the timeliness of appeals would mean nothing. Such a decision would be antithetical to the very purpose of consent judgments. Every case within this Court's jurisdiction in which the district court has entered an order or judgment, by consent or otherwise, would be open to belated attack "on the merits" by claims that the district court's denial of a motion to dismiss or summary judgment years before was "void" and thus that the court did not have judicial authority to issue it.

The defendants did not seek Rule 60(b) modification of the consent decree in light of judicially recognized bases such as new or unforeseen changes of fact or law. See Rufo v. Inmates of Suffolk County Jail, ___ U.S.___, 60 U.S.L.W. 4100 (1-15-92); Akers v. Ohio Department of Liquor Control, 902 F.2d 477 (6th Cir. 1990). The defendants' position is simply that the consent judgment is "void" for jurisdictional reasons.

Rule 60(b)(4) provides that the court "may relieve a party ...from a final judgment...[if]: (4) the judgment is void." The rule also provides that "a motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

Rule 60(b) is a discretionary rule that has been "administered...with a scrupulous regard for the aims of finality."

Wright, Miller & Cooper, Federal Practice and Procedure, § 2857 (1985).

In balancing the two interests--the need for finality in litigation versus respect for the jurisdictional limits of the federal courts--it is black-letter law that a court's decision as to subject matter jurisdiction may not be attacked belatedly through a Rule 60(b) motion:

> It must be noted...that a court has jurisdiction to determine its own jurisdiction. ...[A] court's determination that it has jurisdiction of the subject matter is res judicata on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so.
>
> * * * * *
>
> The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of the issue, if the jurisdictional question actually was litigated and expressly decided and full faith and credit must be given to the judgment. This is true even if the court is mistaken in its decision.

Wright,Miller & Cooper, supra, §§ 2862 and 3536 (emphasis added). Subject matter jurisdiction was raised by the defendants in their 1984 motion to vacate under Rule 60(b)(4), and that motion was denied, and was not appealed. In fact, many portions of the defendants' brief in the Sixth Circuit were taken verbatim from their 1984 brief attacking subject matter jurisdiction.

As noted above, certainly the plaintiffs raised claims pursuant to 42 U.S.C. § 1983 which presented issues generally reviewable under Article III. The claims involved due process interests springing from a host of state statutes, administrative rules, and policies which limited official discretion and which were alleged to be arbitrarily and capriciously applied as a matter of custom and practice on a system-wide basis. See Memorandum Opinion of 3/31/81, Resp. App. at 1a et seq.

The defendants have confused a total lack of power to adjudicate with the issue of whether the decisions on the merits were correct. The "void" judgment language of Rule 60(b)(4) is not intended to allow collateral attack upon a consent judgment, never appealed, nine years after it was entered, just because the defendants assert that the court's rulings were incorrect.

As one noted commentator has concluded:

> In brief, then, except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgment, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned.
>
> So called quasi-jurisdictional facts are not a part of jurisdiction over the subject matter, and the lack thereof will not afford the basis for a collateral attack upon a judgment rendered by the courts which we are discussing. Therefore, a judgment of a federal court is not void, and is not subject to collateral attack on the ground that the rendering court lacked federal jurisdiction, although the judgment is subject to direct attack on that ground....

Moore's Federal Practice § 60.2b2, Rule 60(b)(2d. ed. 1991), pp. 60-229-231 (emphasis added).

As the Eighth Circuit said back in 1943:

> Every court in rendering judgment has the authority and does, tacitly or expressly, determine its jurisdiction over the parties and over the subject matter and its decree sustaining jurisdiction is not open to collateral attack. Stoll v. Gottlieb, 305 U.S. 165, 171, 172, 59 S. Ct. 134, 83 L.Ed. 104; Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377, 60 S.Ct. 317, 84 L.Ed. 329. And when the court which rendered the judgment, having jurisdiction over the subject matter and the parties, has power to adjudicate the issues in the class of suits to which the case belongs, its decision is on the merits [citation omitted] and the validity of its judgment, when collaterally attacked, is not affected by an erroneous decision. Such a judgment is not void, even though there be gross error in the decree.

Walling v Miller, 138 F.2d 629, 632, cert. denied, 321 U.S. 784 (1944)(emphasis added). The principle of Chicot that subject matter jurisdiction cannot be collaterally attacked was specifically reaffirmed in Insurance Corporation of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702, n. 9 (1982).

In this case the Sixth Circuit carefully reviewed each of the arguments made by the defendants, and rejected them. Pet. App. at 15a-38a. Even the concurring judge agreed that the defendants could not re-litigate the jurisdictional issue now, whether the district court was right or wrong when it decided that it had jurisdiction in 1981.

Accordingly, certiorari should be denied on the first question raised by the defendants. They are wrong on the facts, and wrong on the law, and they raise no issues of national importance or on which there is any disagreement among the circuit courts of appeal. See U.S. Supreme Court Rule 10.

II. THE DEFENDANTS CANNOT RE-LITIGATE THE MERITS BY INVOKING THE ELEVENTH AMENDMENT

The defendants' second argument is even more disingenuous than the first. They say that because the decree entered by the district court was based only on state law, any enforcement of the decree now would be barred by a combination of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) and the Eleventh Amendment.[7]

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[7] As noted above, the defendants are wrong to describe the district court's orders as based only on state law, and for that reason alone their Pennhurst/Eleventh Amendment argument must fail. But even if the "state law only" description were true, the defendants are far too late to invoke Pennhurst and the Eleventh Amendment as a means to void the original judgment.

To support this proposition the defendants cite just one case, Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir. 1987), cert. dismissed, 483 U.S. 1057 (1987). Lelsz is distinguishable from the present litigation on at least four separate grounds, any one of which would be enough to undercut the defendants' reliance on it.

1. The nature of the challenge: In Lelsz the defendants were not challenging the validity of the original consent judgment (which had been entered in 1983). Rather, the challenge was to a 1985 order enforcing the consent judgment. The defendants claimed that the 1985 order granted new and different relief beyond what the consent judgment itself permitted, and beyond what federal law would allow as well. Thus, they said, the 1985 order impermissibly exceeded both the scope of the consent judgment and the reach of federal law. The defendants argued that because the new 1985 order was ostensibly based only on state law, and not on federal law, the court could not enter such relief without violating Pennhurst.

To the contrary, in the present case the defendants are challenging only the entry of the original consent decree in 1981, arguing that it is void ab initio. No new order has ever been entered--let alone challenged--changing the substance of that original consent judgment, or going beyond straightforward enforcement of its terms as written. In the present case it is not new, excessive, and exclusively state-based enforcement that is at issue, but the validity of the underlying consent judgment itself.

2. The timeliness of the challenge: The challenge to the

new order in Lelsz was timely. That is, the defendants made their objections in the district court, and when the district court entered the 1985 enforcement order despite their objections, they filed a timely appeal.

The defendants in this case cannot make the same claim. Pennhurst was decided on January 23, 1984. On February 27, 1984, the defendants filed a motion to vacate the consent judgment, citing Pennhurst (and of course again alleging that the consent judgment was based entirely on state law). On November 24, 1984, the district court denied the defendants' motion, and they did not file an appeal. Thus, the defendants' Pennhurst-based challenge (to the district court's exercise of jurisdiction in entering the original consent judgment in 1981) was decided with finality in 1984. As noted above, the defendants cannot file the same motion six years later just by calling it "jurisdictional."

3. The waiver of immunity: In Lelsz the defendants could argue that they had never surrendered the state's Eleventh Amendment immunity as to the 1985 order. Even though the defendants had consented to the entry of the original judgment, and to the relief which might flow directly from it, they were completely justified in arguing that they had never consented to the new, broader relief that was now being forced upon the state by the federal court.

In the present case the defendants cannot make that argument. Pennhurst bars the federal court from entering injunctive relief--based on state law--only in the absence of consent. Here, the defendants explicitly agreed to the entry of five separate partial consent judgments, a series of stipulated

orders, and a final consolidated consent judgment. For the next nine years the defendants subjected themselves to the full authority of the federal court, including monitoring, reporting of data, findings of non-compliance, and payment of attorneys' fees, all without any appeal being taken. Since the defendants in this case consented, and consented, and consented again, Pennhurst does not apply at all. See Resp. App. at 18a-19a.

The defendants also ignore settled law on this point. Where a state enters into a consent decree without having fully litigated the mixed state and federal claims upon which the district court bases its jurisdiction, the state's Eleventh Amendment immunity is waived.

For example, in Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), inmates filed suit against the New York Department of Corrections alleging violations of state-created liberty interests in prison visitation rights. Id. at 241. After the court ruled that the state's practices violated procedural due process rights, the parties avoided trial and entered a consent decree controlling the circumstances under which the Department could suspend or terminate visitation privileges. Id. Eight years after the decree was entered, the state sought to modify the decree. As here, the state argued that the decree violated the Eleventh Amendment as interpreted in Pennhurst II, which prohibited a federal court from imposing injunctive relief against state officials for violations of state law. Id. at 243. The Second Circuit rejected the state's argument. The court held that although Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) "requires [of the court] an

independent assessment of 'inherent jurisdiction,' ...by consenting to the decree, the [state] waived [its] Eleventh Amendment immunity." Id. at 244, citing New York State Ass'n for Retarded Children, Inc. v. Carey, 596 F.2d 27, 39 (2d Cir. 1979) cert. denied, 444 U.S. 836 (1979)(consent judgment itself constitutes a waiver of Eleventh Amendment immunity where the defendants agreed to the judgment before trial).

Similarly, in Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989) cert. denied, 493 U.S. 1056 (1990) inmates of a New Mexico prison filed a class action charging that prison conditions violated their constitutional and federal statutory rights. The parties agreed to a consent decree without the benefit of litigation to determine the validity of the claims. Id. at 1486-87. Seven years later, the state Attorney General filed a motion to vacate, arguing that since portions of the decree did not vindicate federal rights, "the defendants...are beyond the reach of a federal district court." Id. at 1487. The Tenth Circuit rejected the defendants' argument, stating that "by consenting to the entry of the decree, 'without any findings of fact,' [the defendants] left to the court the power to construe the pleadings...." Id. at 1489. See also Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) (the totality of the state's conduct, including agreement to a consent decree and years of monitoring, constitutes unequivocal consent to federal jurisdiction); and Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir. 1977), cert. denied, 434 U.S. 943 (1977)(waiver of Eleventh Amendment immunity is final when the consent judgment itself becomes final).

4. The nature of the waiver: Lelsz suggests that the state's consent in that case (even to the original judgment) would have been no consent at all, because Pennhurst had not yet been decided, and therefore the state was unaware that it had any immunity to waive. The Fifth Circuit in effect gave the state an extra benefit of the doubt, considering that the state's timely raising of the issue (and its timely appeal) was its first post-Pennhurst bite at the apple.

Unlike the defendants in Lelsz, the defendants here can hardly claim now that they have never before had the chance to litigate the waiver of an immunity that (until Pennhurst) they did not know existed. They did litigate it after Pennhurst, and they lost, and they chose not to appeal, way back in 1984. Just as the plaintiffs cannot revive the claims that they litigated and lost (and did not appeal) in the early 1980's, the defendants should also be barred.

Finally, Lelsz itself is unusually weak authority for any proposition, undeserving of the weight the defendants give it. The case is a 2-1 decision with a strong dissent. The panel's opinion is a mishmash of doctrine, combining and confusing issues of jurisdiction, comity, immunity, and waiver of immunity by consent. The confusion is heightened by the fact that Lelsz involved almost identical facts to Pennhurst (a challenge to the conditions and treatment of the mentally impaired at state facilities), so that the panel decision came close to treating Pennhurst as a kind of law of the case. Further, on petition for re-hearing en banc, the Fifth Circuit split 7-7, barely preventing a re-hearing of the case. (One judge on senior status was

even moved to urge the full court to hear the case, even though he did not get a formal vote.) The seven judges who favored re-hearing published a caustic opinion criticizing the 2-1 decision, and noting that "Pennhurst has been badly misapplied in this panel decision." Lelsz, supra, at 1036.

From the longer post-Pennhurst perspective of 1992, probably the best that can be said of Lelsz is that it authorizes the federal court to treat Pennhurst as a change of law that might justify a motion to modify a consent judgment (entered into before Pennhurst was decided). That is exactly what the defendants did in 1984 when they filed a motion under Rule 60(b). They lost the motion, and they didn't appeal, and as is shown above, they shouldn't be able to re-litigate that issue now.

Thus, on the second question presented in the petition for certiorari, the defendants have not shown any issue of national importance, any disagreement among the circuits, or any clear error in the court below that cries out for correction. Accordingly, the defendants' petition for certiorari should be denied.

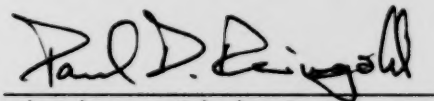
At this point the case is in ongoing litigation in the district court, where it belongs. The district court is seeking to enforce, at last, the terms of the consent judgment agreed to by the defendants in 1981. If the district court is successful, and if the defendants are held to their promise to make the parole system fairer and more efficient, then the savings to Michigan taxpayers will be enormous. After four years of litigation, and 11 years of post-judgment supervision by the district court, the defendants cannot seriously argue, at this

late date--that the district court lacked or lacks subject matter jurisdiction.

CONCLUSION

For the above reasons, the plaintiffs (respondents) request that the defendants' petition for certiorari be denied.

Respectfully submitted,



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Dated: Feb. 14, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON; OSCAR PARTEE; and JAMES SIKON, Individually and On Behalf of All Other Person Similarly Situated,

Plaintiffs,

-vs- Case No. 77-72230

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD McCONNELL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP, and EDWARD TURNER, Members of the Parole Board of the State of Michigan,

Defendants.

/

MEMORANDUM OPINION AND ORDER

This class action was brought on behalf of all inmates within the present and future jurisdiction of the State of Michigan Department of Corrections, whose parole eligibility is determined by the State of Michigan Parole Board. The defendants are the Director of the Department, and the members of the Parole Board. The complaint alleges a pattern of activity in violation of pertinent state regulations, state law and the United States Constitution. The plaintiffs assert that their Fourteenth Amendment due process rights are abridged by the state's method of administration of the parole system as a whole.

On December 16, 1980, after an extended period of discovery, the disposition of several motions, and diligent efforts to settle the litigation, the parties entered into a partial consent judgment resolving many of the claims of constitutional violations originally asserted. Following notice to all class members, receipt and review of objections to the partial consent judgment from scores of inmates in the state system, the addition of one organized group of these inmates as party plaintiffs, and revisions of the proposed settlement in light of inmates' objections and suggestions,

the court approved the partial consent judgment. That order was entered on December 29, 1980.

Two issues remain in litigation, (inmates' access to their own files and distribution of a parole information booklet) which have been submitted to this court on cross-motions for summary judgment, there being no material disputes of fact. After consideration of the parties' stipulated facts, their briefs and oral argument, the plaintiff's motion is hereby granted, and judgment entered accordingly.

ABSTENTION

Defendant has raised the issue of "abstention" in its brief. Defendant asserts that the file-access portion of the lawsuit, which challenges present policies under the United States Constitution and the Michigan Freedom of Information Act, [MCLA §15.231 et seq; MSA §4.1801(1)], is best left to the state courts.

Procedurally, the abstention argument is untimely. The cross-motions under consideration here were filed in June and July of 1980, and argued to the court in January of 1981. In October of 1979, the defendants first raised this "abstention" issue, by motion. That motion was fully briefed by the parties, and following oral argument, the court denied the motion in March of 1980 (after re-assignment of this case from the docket of the chief judge of this district, in November, 1979). No motion for rehearing was timely filed, and the defendants have presented no justification for belated reconsideration of that decision. To the contrary, the successful efforts of the parties to resolve a major portion of this complex litigation, and the future role of this court in enforcing and overseeing the implementation of that joint resolution compels the disposition of the rest of the case by this court, and no other. Moreover, if defendants' tardy request for reconsideration were appropriate under the Federal Rules of Civil Procedure and the Local Rules of this court, it would nevertheless be

denied. The "abstention" doctrine, as announced in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), instructs federal courts to abstain from ruling when construction of previously uninterpreted or uncertain state laws control a constitutional issue placed before the federal court. Such is not the case here. First, the Michigan Freedom of Information Act (hereinafter MFOIA) is not a new, untested or uninterpreted statute. Courts of this state have entertained litigation under it since enactment in its most recent form in 1976. The 1976 codification was, at least in part, a reworking of existing administrative law embodied in the state's Administrative Procedures Act, being Public Act 306 of 1969. Thus, the current legislation has a history which, if not venerable, is at least old enough to enable the federal courts to avoid treading on "new" territory which should first be explored by the state. Furthermore, the state courts have looked to the abundant federal case law interpreting the parallel federal FOIA, 5 USC §552, et seq, for assistance, which this court is equally well equipped to do.

Most importantly, the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart independent liberty interests to those inmates participating in the system. Thus, though the meaning of the MFOIA is not unimportant to determining access rights, this court must first and foremost independently assess whether access rights are fairly and adequately dispensed as promised. The shortcomings of present policies constitute not only a violation of the MFOIA, but primarily, as far as this court is concerned, a violation of federal constitutional due process rights which were born from state promises and are now totally independent of the definitions

or perimeters of the Michigan Act. This violation is a federal issue, to be addressed by this court.

The defendants' argument that abstention is advisable due to the pendency of a similar state lawsuit, DeLion, et al v. Michigan Department of Corrections, C.A. No. 78-22032, Ingham County Circuit Court, must also fail. In fact, the DeLion lawsuit seeks different relief, is not yet a certified class action and should not stay the hand of this court. The defendants rely on Younger v. Harris, 401 US 37 (1971), which precludes a federal court from acting to enjoin an on-going state criminal prosecution -- a vital doctrine, which is part of the doctrine of "abstention", but one not relevant here.

The request for rehearing on the abstention issue is, therefore, denied, and the court will reach the merits of both the file access issue and the parole information booklet distribution issue.

INMATE ACCESS TO FILES

On May 19, 1980, the parties entered into a stipulation of facts, summarizing the present policies of the Department. These stipulated facts demonstrate that, prior to the 1976 passage of the Michigan Freedom of Information Act, inmates were not permitted any access to the files concerning them maintained by the Department, and that post-1976 access is extremely limited and varied.

The files in question include a "Central Office File," kept in the Department's offices in Lansing, Michigan; an "Institutional File," kept at the institution where the inmate is incarcerated; and assorted medical, academic, accounting and other files. The Central Office File usually is more comprehensive than the others, as it includes direct correspondence from external sources to the Department or Parole Board, Board notes, screening materials, and Field Service reports not found in other files. The Central Office File is the file utilized by members of the Parole Board for

their reference and preparation, before each prisoner's Parole Board hearing.

At present, the Department will not send the Central Office Files to the institutions for actual viewing by inmates under any conditions. Requests received in Lansing for "my file" elicit a direction to the inmate to consult his institution, in order to gain access to his institutional file. Requests for specific documents out of the Central Office File are complied with by furnishing copies to inmates, but the requests must specifically name the document in question. Access to Institutional Files varies from one facility to another. All of the facilities exempt certain documents from any disclosure at all (such as pre-sentence reports, police reports), limit disclosure of other types (such as psychological reports), and allow disclosure of others to inmates. This disclosure is further limited in frequency, from facilities which permit access once a year (including the State Prison of Southern Michigan and the Marquette Branch Prison, the two dominant facilities in the state system) to those permitting access every six months, to those (including the women's facility and the prison camps) permitting access as frequently as requested. At least one facility also limits the time that is made available for "hands-on" inspection of the file by an inmate--Marquette Branch Prison limiting this to one hour (once a year).

An analysis of the stipulated facts and the details of the policy directives issued by the Department, demonstrates that the Department's current policy is typified by an obstructive refusal to reveal vital information to inmates involved in the parole process.

Having established policies, purporting to grant a right of access, and to regulate it (the existence of some such policies probably being mandated, at least in this state, by the MFOIA), the precise terms of such access must not be arbitrary and unreasonable, or they risk violation of due

process. Arbitrary implementation of arbitrary rules violates the inmates' liberty interest, which the state has itself created, Wolff v. McDonnell, 418 US 539 (1972), Meachum v. Fano, 427 U.S. 215 (1976), Walker v. Hughes, 558 F2d 1247 (6th Cir. 1977).

The basic purpose of access should be borne in mind -- the inmates who make these requests are not to be viewed as annoying paranoids who seek to fill their "personal and self-serving needs," as the defendants assert in their brief. Defendants' view that the plaintiffs seek "nothing more than a discovery tool and to engage in fishing expeditions," contraverts the intention of the MFOIA and gratuitously insults the overwhelming majority of prison inmates. This court is not unmindful of the administrative burdens already placed on the persons in charge of this state's prison system (whose overcrowded conditions constitute the basis of judicial and legislative action elsewhere than before this court), and is also aware that the long periods of unstructured time available to inmates allows them time to seek assistance from prison personnel, and indeed the courts, which might seem time-consuming or trivial. But an inmate who faces a Parole Board, whose members have virtually unreviewable control over his or her personal freedom, is entitled to make demands on prison officials, and to know the information upon which those members will make their decision, without such demands being ignored or subjected to unreasonable dissection. Requests for access to files which are understandable to an average person must be complied with, once the state has, in essence, "promised" its inmates that some form of access will be allowed.

Without adequate access to files, and the information contained therein, an inmate has no real possibility of refuting inaccurate, biased, or misleading information therein. The files, and the Central Office File in particular, are heavily relied upon by Parole Board members

who, of course, have no personal knowledge of an inmates' behavior, either prior to or during incarceration. The inmate is afforded an opportunity to express his or her view to the members, but can more effectively do so when he or she has access to the information (or most of the information) on which the Parole Board members rely.

In its brief, and in oral argument, the plaintiff asserts that inmates have a direct federal constitutional right to access to institutional files. This is an issue not specifically addressed by the United States Supreme Court, although its recent decision in Greenholtz v. Nebraska Penal Inmates, 442 US 1 (1979) clearly holds that due process requirements at a parole board hearing are minimal. The specific issue of file access is one on which various circuit and district courts have split, with courts in the Second and Fourth Circuits and a district court within the Eighth Circuit holding that there may be such a due process right, under certain circumstances (Holup v. Gates, 544 F.2d 82, 2d Cir. 1976, cert den 430 US 941 1977; Williams v. Ward, 556 F.2d 1143, 2d Cir. 1977, cert den 434 US 944, 1978; Franklin v. Shields, 569 F.2d 184, 4th Cir. 1977, en banc, cert den 435 US 1003, 1978; Paine v. Baker, 595 F.2d 197, 4th Cir., 1979; and Cooley v. Sigler, 381 FS 441, Minn., 1974). Other courts have held that this right of access is not constitutionally mandated -- Dye v. United States Parole Commission, 558 F.2d 1376, 10th Cir., 1977; Ott v. Ciccone, 326 FS 609, D.Mo. 1970; Wiley v. United States Board of Parole, 380 FS 1194, D.Penn. 1974; Barr v. United States, 415 FS 990, D. Okla 1976; Wagner v. Gilligan, 425 FS 1320, D. Ohio 1977; Nunley v. United States Board of Paroles, 439 FS 887, D. Okla. 1977; Gahagan v. Pennsylvania Board of Probation, 444 FS 1326, D. Penn. 1978.

Judge Feikens, in an opinion rendered in this cause in August of 1978, also held that the procedures generally employed by the defendants in the parole process need not

comport with federal constitutional due process guarantees, relying on the case law preceding, and adopted by Greenholtz. To the extent that that ruling implicitly holds that there is no direct due process right to file-access, it is the law of this case.

At all events, it is not necessary for this court to grapple with this theory, since this court holds (as did Judge Feikens) that the state's promulgation of policies and regulations which purport to provide for some right of access, create a liberty interest in inmates that cannot be arbitrarily or capriciously abridged. The existence of the MFOIA also serves to "vest" a liberty interest in the inmates, as well as serving as a guideline to this court in its determination of what policies are reasonable, non-arbitrary and therefore constitutional.

The rules promulgated by the Department governing access to files have been furnished to the court. They are listed by reference number, among the stipulated facts, and consist of thirteen operating procedures, two policy directives and eight Director's Office Memoranda. They are comprehensive, and much of the procedure spelled out therein is constitutionally adequate. It appears, however, that there is a great deal of unreasoned disparity between the terms of the rules among the several facilities, that certain terms are unduly restrictive, and that the Department implements these rules in a manner that places virtually insurmountable obstacles in the path of an inquiring inmate.

Critical to this dispute is the required specificity of file requests. Presently, an inmate's desire to view or obtain copies of documents in his or her Central Office File is completely thwarted if the request is for "my file," or "all the documents in my file," or "the contents of my Central Office File." The provisions of the MFOIA and case law establish that citizens need only make requests which are descriptive enough to sufficiently enable the public agency

to find the public record (MCLA §15.233(1) and Citizens for Better Care v. Department of Public Health, 51 Mich App 454, 1974, lv to app den 392 Mich 758, 1974). The federal act contains the same language, and is interpreted in the same way (5 USC §552(a)(3) and Bristol-Myers Co. v. FTC, 424 F.2d 935, D.C. Cir., 1970). A prison inmate should be held to no higher standard of specificity, and requests addressed to Lansing for "my file" or the like, should be complied with, in full, by prompt provision of copies of all non-exempt documents found in the file. Subsequent similar requests should be met by the provision of all documents in the file, non-exempt, which came into the file since the last request. Logic dictates that the Department not be required to furnish papers which it has previously furnished to an inmate.

A copying charge is presently levied on non-indigent inmates for such activity, which the court finds to be a reasonable practice.

Physical inspection of the Central Office File does not seem a reasonable possibility to this court. Inmates, of course, cannot be transported to Lansing easily, and the plaintiffs have not suggested this course of action. Similarly, however, release of the Central Office File to the institution, potentially with great frequency, could hamper the efficient operation of the parole process, and complicate access to records for members of the Parole Board.

Copy-access to Institutional Files should be handled in the same manner as this court instructs the defendants to manage copy-access to the Central Office File. Any policies which require the inmate to name the documents in the file without seeing it first, a practice which the plaintiff aptly labels as a "grab-bag" effect, violate the inmate's due process rights.

Physical inspection of the Institutional Files by general population inmates poses little administrative or security risk to the defendants and, in fact, is routinely

allowed in some facilities now. Rules precluding review by inmates in segregation or otherwise separated from the main population for disciplinary reasons are sensible, and may be maintained. However, harsh limitations to annual or bi-annual inspection, found in numerous facilities, are unreasonable. A citizen who wishes to inspect any type of public record is not limited to a certain number of requests (or one) per year, under either the Michigan or federal FOIA. A limitation of that type would hamper the free discovery of information regarding public affairs, since such information is constantly growing and changing. Significantly, the defendants have presented no justification for this arbitrary limitation, or for its variance from one facility to another, and the rule unfairly restricts inmates' access rights to highly personal information on which their liberty may hinge. An inmate may encounter multiple occasions during a year when the imminence of parole hearings, parole decisions, or events otherwise affecting the term of incarceration and eligibility for parole, compel him or her to seek information from the files. On these occasions, no matter how near in time, the inmates should be allowed to request copies of any documents added since the last inspection of the Central Office File, and to inspect or obtain copies from the Institutional File. Requirements of due process cannot countenance any arbitrary limitation on the number of times during a year that such a request may be made, and all policies to the contrary cannot stand.

The court also finds that the time limitations for study of file materials (such as the one hour maximum at Marquette Branch Prison, Michigan Dunes Correctional Facility, and the Michigan Intensive Program Center) are arbitrary and irrational, and cannot continue. The court presumes that prison authorities can exercise reasonable discretion to ensure that inmates examining files are not somehow taking advantage of this ability to spend undue amounts of time away

from other required activies. These authorities can use their own reason to curtail over-long inspections. But the implicit suggestion behind such limitation -- that an incarcerated person will eagerly prolong such review sessions, in order to achieve some unexplained and improper or unlawful personal goal -- is the very essence of an arbitrary limitation, in violation of due process.

Requests for copies or for physical inspection should be promptly answered, and the defendants are ordered to modify existing regulations, as needed, to bring them all into conformity with the five-day response period dictated by the MFOIA [MCLA §15.235(2)].

Certain documents have been declared to be exempt from any disclosure by the Department, in its regulations and policy guidelines. It does not appear that the various facilities' regulations are uniform in this regard. Some are very specific, while others offer only generic proscriptions, such as the exemption from disclosure of information that would "place another individual in potential danger," or of psychological reports whose release "would be detrimental to the [inmate's] condition or treatment." These limitations must be uniform among all facilities, and the defendants are instructed to submit a complete listing of documents categorized as exempt or non-exempt for the court's approval. Only those documents whose release would pose a serious security risk, harm to the inmate or others, or invasion of another's privacy should be exempted.

The defendants are directed to revise the guidelines and policies in issue, and to administer them in accordance with this opinion. Nothing in this opinion should be construed to invalidate or render unnecessary those parts of current policies which are designed to protect the inmate's right of access (such as the duty of the Department to explain the reason for non-disclosure of exempt material.) The inmate's right to access, once given (by both Departmental policy

and the MFOIA) cannot be rendered useless by strict and arbitrary limitations. Inmates are to be informed of the new policies, once formulated, and the parties are requested to compose a plan permitting monitoring of compliance with this opinion and order by the plaintiffs' counsel, over the next six months. No damages are awarded to the plaintiff for past violations of their due process rights, or their rights under the MFOIA.

DISTRIBUTION OF THE PAROLE INFORMATION BOOKLET

The second issue presented to the court on cross-motions (defendants having addressed it in oral argument, but not in their brief), concerns the dissemination of a parole information booklet. The parties have stipulated to composing the booklet, and argee to its inclusion in the Resident Guide Book -- a large compilation of prison rules and regulations which is given to all inmates upon entering the institution.

The defendant argues that this method of distribution is sufficient to inform inmates of their rights in the parole process. Plaintiff submits that the information contained in the booklet should be redistributed to individual inmates, at the time that they begin the parole process. Each inmate is entitled to a meeting with officials at the initiation of this process to prepare a Parole Eligibity Report, and plaintiffs suggest that this is the occasion on which the booklet should be redistributed to the inmate.

Defendants' reason for opposing this suggestion is that it is "unnecessary." The plaintiffs have pointed out that the administrative burden and the expense of a second distribution would be minimal (projecting that a two-year supply, of 15,000 copies, would costs $1,000.00).

The procedure that plaintiff requests is more useful to inmates, for whom the time between entry into an institution and parole eligibility may be long. They are frequently moved among the various institutions of the system, and have

minimal control over the security of their possessions. Defendant does not earnestly oppose it, and plaintiffs' motion is therefore granted.

ATTORNEY FEES

Plaintiffs seek attorneys fees for their successful litigation of this civil rights suit, under the authotity of 42 USC §1988. The court will award such fees based upon the parties' agreement upon amount, or upon motion filed within thirty days of the entry of judgment in this case.

Anna Diggs Taylor

ANNA DIGGS TAYLOR,
United States District Court

Dated: March 31, 1981

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF MICHIGAN

EASTERN DIVISION

JAMES A. SWEETON, et al,
Plaintiffs,
-vs- NO. 77-72230

PERRY JOHNSON, et al,
Defendants.
_____/

EXCERPT - OPINION

BEFORE THE HONORABLE ANNA DIGGS TAYLOR, JUDGE

On Thursday, May 31, 1984, Detroit, Michigan

APPEARANCES:

ROBERT GILLETT, ESQ.
Attorney-at-Law
Appearing on behalf of Plaintiffs

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Appearing on behalf of Plaintiffs

BRIAN MACKENZIE, ESQ.
Attorney-at-Law
Appearing on behalf of Defendants

Bradly L.B. Williams, CSR-1339
Official Court Reporter

Detroit, Michigan

May 31, 1994

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(The Following is an excerpt)

THE COURT: In the Defendant's motion to vacate the Court's final order, consolidation of opinion order and consent judgments dated September 1st, 1981, is denied. The Court first must note that a Judge's mental finality is central to the exercise of judicial power and responsibility.

If simply putting an end to disputes were not a valuable social goal, there would never be a reason for Courts to exist, because our purpose on this earth is to accomplish that purpose. And, the argument presented here by this motion, proponents of this motion, render it sort of as a simple futility, on the face of it, particularly in United States Disttrict Court, I suppose in the United States Judiciary.

The Court also notes that it's final order does reflect a number of agreements which were entered into voluntarily by the parties to this case. Many of the matters in the order were not adjudicated by this Court, but were hammered out by the parties, often under the auspices of the Court, but not by the Court's decision making the 6th

Circuit Court of Appeals, noted in Williams vs Goobivitch (ph), 620 Fed Sec., 909, a consent decree is essentially a settlement agreement subject to continued judicial policing the terms of the decree unlike those of a simple contract, have unique properties. A consent decree has an attribute of both a contract and a judicial act. A consent decree should be strictly construed to preserve a bargain or positi of the parties.

A Court has no occasion to resolve merits of disputed issues or the factual underpins of the various legal theories advanced by the parties. A consent decree is also a final judicial order, judicial approval of a settlement agreement, placing the power and the prestige of the Court behind the compromise struck by the parties. And, this final order of the Court is indeed, a compromise, and on page two, Section One, paragraph B, the final order states, "This final order is not intended to constitute an admission of liability by Defendants on those issues resolved by the consent judgments of June 11, 1980, and December 16, 1980."

The Court's jurisdiction over this case is and was proper, and this judgment may not now be vacated under the Federal Rules as being void. The Federal Court has jurisdiction to determine its own judicial authority. So, if the defendant has challenged the Court's subject matter

jurisdiction and the Court issue has been resolved against defendant by a final judgment, the judgment is not void but is Res Judicata on the issue of jurisdiction.

In this case the Defendants have challenged the Court's subject matter jurisdiction at least three times, and ruled against at least that many times on, specifically, the question of whether this Court had jurisdictional authority to hear and decide this case.

These rulings commence with Judge Feikens' decision in favor of the Federal jurisdiction in August of 1978. And, this Court in March of 1981, again found that there is Federal jurisdiction. The law in this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of State Statute regulations and policies regarding the parole system, as a whole, impart independent liberty interests for those inmates participating in the system. So, this Court previously decided the jurisdictional question and its decision is Res Judicata, and is the law of the case.

As to the challenges made, Defendants appealed from that decision, and they voluntarily dismissed their appeal and that decision in all other points.

ThePenthurst (ph) decision is not applicable in a situation of this posture. In this case the Court did have proper Federal jurisdictional authority over the matter.

And incidentally the Plaintiff's claim the Michigan Freedom of Information Act - - their access to file the claim in the 8-28-1981 order, is noted. The claim under the Freedom of Information Act in Michigan is handled by stipulation in that order that that claim does not, in and of itself, create constitutional due process rights.

However, the stipulation recognized as well, this Court's authority to interpret the Michigan Authority to the pending jurisdiction of the Court, because of this Court's jurisdiction of the other matters.

The Defendants finally waived their immunity, completely, by their participation in every step of this litigation. On the merits, they're releiving themselves of complete litigation of the controversy between the parties by obtaining a settlement from Plaintiffs and getting approval of this Court of that settlement agreement without admitting to any wrong doing or liability.

The issue of jurisdiction, as all other issues in the case have been resolved by settlement between the parties, and the orders entered, permanently, thereto, and there has been complete waiver of any question of the jurisdiction of this Court in the matter.

As to the argument as to whether Federal jurisdiction is presented by the claims of the plaintiff, under the present state of the law, although this present

state of the law does not govern the situation, the Court notes that the Michigan Law, rules and regulations, as it found before, still do create the liberty interest of releasability under certain circumstances, a presumption of releasability that Plaintiffs maintain for the prisoners.

That is a Federally actionable right, that is a constitutional liberty interest over which this Court always has jurisdiction. So, the request to vacate the Court's order in the matter is denied.

(Excerpt Concluded)

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I Bradly L.B. Williams, do hereby certify that I reported the proceedings had in open Court in the above entitled matter before the HONORABLE ANNA DIGGS TAYLOR, United States District Court Judge, For the Eastern District of Michigan, at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision, and that the foregoing transcript is a full, true and accurate transcript of my stenotype notes.

Bradly L.B. Williams, CSR-1339
Official Court Reporter

Dated: April 20, 1990

Any mechanically produced copies of this transcript are certified only with original signature.